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Revival by Revocation of a Later Instrument--Effect of a Revocatory Clause

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4. When the Judgment is not Proper Because of Prior Errors of the Court.

Another way in which a party may lose his right to a judgment *non obstante* is through the court's committing errors prior to the refusal to grant the motion for judgment. For example, in an action on a fire insurance policy, plaintiff's petition failed to allege any loss sustained, and there was no evidence offered by plaintiff to cure this defect. At the close of the evidence, defendant made a motion for a peremptory instruction for a verdict in his favor, which was denied by the trial court. After the jury returned a verdict for the plaintiff, the defendant moved for judgment *non obstante*, which was also denied. On appeal, the court held that defendant was not entitled to a judgment *non obstante*, but only to a new trial for the error of the court in refusing to grant the motion for peremptory instruction.[31] Many other cases are in accord with this principle.[32] The Kentucky Court of Appeals has said, "This court is committed to the doctrine that in this situation the first error of the trial court will be corrected on appeal."[33]

In conclusion it may be stated briefly that under Kentucky Code Section 386 as it has been interpreted by the Court of Appeals, a party may properly move for a judgment notwithstanding a verdict for the adverse party when

1) the pleadings of the adverse party are insufficient in substance to allege a cause of action or constitute matter of defense, and that defect has not been cured by subsequent pleadings or by the verdict, and
2) the trial court has not committed previous errors, such as refusing a proper peremptory instruction, and
3) the motion is made before entering of judgment in conformity with the verdict.

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REVIVAL BY REVOCATION OF A LATER INSTRUMENT—EFFECT OF A REVOCATORY CLAUSE

In England prior to the Will's Act of 1837[1] there were two distinct views as to the revival of a will by the destruction or revocation of a subsequent and revoking will. Under the common law rule a former will which had been left uncanceled and preserved was automatically

[31] Ct. Fire Ins. Co. v. Moore, 154 Ky. 18, 156 S.W. 867 (1913).

[32] Mast et al. v. Lehman, 100 Ky. 464, 38 S.W. 1056 (1897); L. & N. Ry. v. Paynter's Admr., 26 Ky. L. Rep. 761, 82 S.W. 412 (1904); Ct. Fire Ins. Co. v. Moore, 154 Ky. 18, 156 S.W. 867 (1913); L. & N. Ry. v. Johnson, 168 Ky. 351, 182 S.W. 214, L.R.A. 1916D, 514 (1916); Sheffield-King Milling Co. v. Sorg, 180 Ky. 539, 203 S.W. 300 (1918); Baskett v. Combs' Admr., 198 Ky. 17, 247 S.W. 1118 (1923); Franklin Fire Ins. Co. v. Cook's Admr. et al., 216 Ky. 15, 287 S.W. 553 (1926). But see Weikel v. Alt, 234 Ky. 91, 27 S.W. (2d) 684 (1930).

[33] Jones v. Hendley, 224 Ky. 83, 5 S.W. (2d) 482 (1928).

[1] Act. 1, Vic. c. 26, Sec. 22 (1837).

revived by the destruction of a later revoking instrument.[2] Under the Ecclesiastical rule, whether the prior instrument was revived depended entirely upon the intention of the testator, the act itself creating no presumption as to revival of the former instrument. The intention of testator might be shown by extrinsic evidence.[3] The Will's Act provided that a will could be revived only by a new will or codicil or by re-execution, and the courts construed revocation by subsequent instrument to be effective from the date of its execution.[4] Consequently, both the common law rule and the Ecclesiastical rule were, in effect, abolished.

American jurisdictions vary greatly on this question of revival by revocation of a later and revoking instrument. Several states have enacted statutes very similar to the English Will's Act, making re-execution or codicillary republication necessary.[5] By statute or construction some follow the English common law rule[6] and some follow the English ecclesiastical rule.[7] All states except Tennessee have statutory provisions for the revocation of wills.[8]

It is the purpose of this paper to determine to what extent American jurisdictions[9] distinguish, in this matter of revival, between a later revoking instrument which contains a clause of revocation and one that is inconsistent, only. This question is expressly settled by statutes in some states,[10] but this note is concerned chiefly with the atti-

[2] Page on Wills (2d Ed.) Vol. I, Sec. 422 *et seq.* See also, Goodright v. Glazier, 4 Burr. (Eng.) 2512 (1770), Harwood v. Goodright, 1 Cowp. (Eng.) 87, 91 (1774).

[3] Usticke v. Bawden 2 Addams (Eng. Eccl.) 116 (1824).

[4] Page on Wills (2d Ed.), Vol. I Sec. 446.

[5] For list, see (1922) 7 Minn. Law Rev. 158, Note 11, and Rood on Wills (2d Ed.), Sec. 363, Note 72. Kentucky is included in this group and its statute is to be commended. Ky. Stat. (Carroll, 1936), Sec. 4834: "No will or any part thereof which shall be in any manner revoked, shall, after being revoked, be revived otherwise than by re-execution thereof, or by a codicil executed in the manner hereinbefore required; and then only to the extent to which an intention to revive the same is shown therein."

[6] Rood on Wills (2d Ed.), Sec. 361, Note 63.

[7] Ibid, Sec. 362, Note 65.

[8] Bordwell, *Statute, Law of Wills*, (1929) 14 Iowa Law Rev. 283.

[9] In James v. Marvin (see note 10, infra) the court cited *Powell on Dev.* (Ed. of 1827, p. 527, 528) as indicating that the Early English courts did recognize some distinction between a later will with express revocation and one without, in the matter of reviving the former will. But it would be difficult to say that this was the general rule in England for it was not always clear whether the English courts were speaking of a will with an express revocation or one that was inconsistent merely. However, subsequent to the Will's Act that problem has given the English courts no concern, since the former will must be re-executed in either case.

[10] Georgia Statutes (Parks Ann. Code, Vol. 3, Sec. 3917, 3920) provide that an express revocation "takes effect instantly and independently of the validity or ultimate fate of the will or other instrument containing it" but an implied revocation arising from inconsistent

tude and holdings of courts which are not thus limited by statutes. Is a former (and still existing) will revived by the destruction or revocation of a later will which is inconsistent merely and is it not revived thus when the later will expressly revokes the former? Due to hasty statements on the part of text-writers and ill-considered dicta on the part of courts there is much more confusion on this matter than is justified by the actual holdings of the courts. This confusion is due in no small part to the fact that decisions are so often affected by the various state statutes and because different jurisdictions follow different rules. In discussing this problem the theory upon which the distinction between the two kinds of wills is made will first be considered and then the leading cases of those jurisdictions which are generally cited as making such distinction will be examined and considered.

On what basis or theory is such distinction made? Those who distinguish between the two kinds of wills necessarily adhere to the doctrine that express revocation is immediately effective upon the execution of the will. That doctrine is clearly promulgated in its leading case, *James* v. *Marvin*[11] which is one of the few cases that clearly hold that such a distinction exists. In that case it was said that a will revoking by inconsistent provisions is ambulatory until the death of the testator, and that although the testator intends to revoke the first will when he makes the second one, he may change his intentions at any time before his death. An express revocation, it was said, is instantaneous, revoking the former will by its own force without regard to the consummation of the will of which it is a part, or the future disposition of the property.

If the intention of the testator is to govern, certainly the insertion of an express revocation is not conclusive in determining such intent. The revocatory clause might be inserted by the testator or his scrivener as a matter of form with little thought as to its effect. And while it may be persuasive evidence that the testator meant the later will wholly to revoke the former *if it became operative* it is far less persuasive that testator intended the revocation to be effective at all events and without regard to the fate of the instrument of which the revocatory clause is a part. While such a clause might be the deciding factor in determining testator's intent in some cases, the desirable course to pursue is to admit evidence under both situations, and having determined testator's intent, render judgment accordingly.

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will "takes effect only when the inconsistent will becomes effectual, and hence, if from any cause it fails, the revocation is not completed". However, it is further provided that the intention of the testator to revoke is necessary in all cases and that "an express revocation clause will not operate upon a testamentary paper where it is manifest that such was not the intention". A Missouri statute (Rev. Stat. 1929, Sec. 524) provides that canceling or revoking a later will does not revive the first unless it appears that testator's intentions were such, etc.

[11] 3 Conn. 576 (1821).

Suppose that T has given Blackacre to A by will. In a later will he gives Blackacre to B. Certainly T's intention is, when he executes the second will, that B shall have Blackacre and A shall not have it. But suppose that T then cancels or revokes the second will. It is clear that he does not wish B to have Blackacre but does it mean that he now wishes A to have it or that he does not intend that either A or B shall have it? The mere act of destroying the second will, whether it contained express revocation or not, will throw little light on his intentions but the circumstances under which it is done may do so. If the first will is preserved and is treated by T as his will, evidenced by his words or acts, then the fact that it contains express revocation should not prevent the revival of the first. On the other hand, if T has not preserved the first will with any care and there is evidence that he does not treat it as a valid will it should not be held revived although there is no express revocation in the second will. Oral expressions or acts of T when the express revocation is inserted may clearly reveal his intention, but when taken alone it should be accorded very little weight.

As to the statutory provisions for revoking wills, most of the states fall into two groups. One group follows the English Statute of Wills, providing that a will may be revoked by "burning . . . or by another will or codicil, or *some other declaration in writing, etc.*" [12] Seven states restrict revocation by instrument to "will or codicil" only.[13] The contention that the revocatory clause takes effect immediately is usually found in courts of the first group of states. Those of the second group (if unaffected by statute) tend to accept the view that since a will can be revoked by a will or codicil, only, the revocatory clause can be effective only as a part of the will, and it, therefore, is ambulatory and not effective until testator's death. But under the statute adding "other writing" it is contended by some that the revocatory clause may be treated as a declaration in writing separate and apart from the rest of the will. The logic of this view is questionable. It seems unsound to say that the revocatory clause is not a part of the will, or that it can be treated as a separate and effective instrument within itself, although the will in which it is found may never become effective but canceled or destroyed before testator's death. If this view is accepted it would seem just as logical to consider an instrument which is wholly inconsistent with a former will as a *revocation declared in writing, etc.*, apart from its disposition of property, and immediately effective. In either case the intention of the testator should prevail.

The effect of the statute providing for revocation by written instrument other than a will or codicil is illustrated by the Connecticut court when it overruled or reversed *James* v. *Marvin*. In 1822, the year following the decision in the *Marvin* case the Connecticut legislature enacted a statute which provided that a later "will or codicil" should

[12] See Bordwell *Statute Law of Wills*, (1929) 14 Iowa Law Rev. 283, for a discussion and treatment of the various state statutes on revocation of wills.

[13] Ibid. States named: Colo., Conn., Iowa, Mo., Nev., Wash., Wyo.

be the means of revoking a will by instrument. In *Peck's Appeal*[14] the doctrine promulgated in *James* v. *Marvin* was somewhat modified and in *Whitehill* v. *Habling*[15] (1922) the Connecticut court completely repudiated that doctrine. In that case the testator destroyed a second will which contained a clause of revocation, expressing his intention that the first will should be valid, and the court so held it. The court based its decision on the statute enacted in 1822 and declared that this had been the rule in Connecticut ever since the statute had been enacted. Under the statute, it was said, a will could not be revoked except by a will or codicil, *effective at testator's death.*

In a dissenting opinion in *Whitehill* v. *Habling* it was argued that the legislators did not have in mind an *operative* will when they provided that revocation may be by a will or codicil but that such revocation was effective upon the execution of the will. This construction seems to be followed in those jurisdictions which have a statute similar to the Will's Act which provided that, "no will or codicil which shall in any manner be revoked, shall be revived otherwise than by the re-execution thereof, etc." Under this statute the destruction of a second will alone never has the effect of reviving a former will. It would seem, therefore, that the first will, if revoked, must be revoked by the execution of a second will which contains express revocation *or* inconsistent provisions. Indeed, if this construction is not to be accepted the term "revival" is a misnomer in the discussion of this problem for, if the revocation depends upon a will's becoming operative, a will which never becomes operatives never revokes the former will, and a will which has not been revoked cannot be revived. It has been suggested that the term "restoration" might be more appropriate.[16] If it is accepted that revocation takes place upon the execution of the second or later will, then the distinction between a will containing a revocation clause and one which is merely inconsistent comes to naught.[17]

Jurisdictions generally cited as distinguishing between the two kinds of wills. Although dicta on this question are widespread, few states generally are cited as following the doctrine of express revocation. The courts of Texas, Michigan, and Wisconsin have been referred to as limiting their decisions that revocation of a later revoking will does not revive the former, to cases in which the former will was expressly

[14] 50 Conn. 562, 47 Am. Dec. 685 (1883).

[15] 98 Conn. 21, 118 Atl. 454 (1922).

[16] Alvin E. Evans, *Testmentary Revival,* 16 Ky. Law Jour. 47 (1927).

[17] In speaking on an inconsistent will here it is meant that the will is wholly inconsistent. A will which does not contain an express clause of revocation and leaves property undisposed of would, under most jurisdictions, be probated along with the former will which is revoked only to the extent of the inconsistency. In a will disposing of a large amount of property, in which there is a number of bequests and devises, a residuary clause would have about the same effect as a revocatory clause since it would show testator's intent that all his property should pass by that will. See, 22 Ky. Law Journal 469, at 494.

revoked by the later one.[18] These states all have statutes which provide that a will may be revoked by written instrument other than a will or codicil.

Hawes v. *Nicholas*[19] is often cited as a Texas case supporting the doctrine that express revocation is immediate. While that case held that the cancellation of a will expressly revoking all former wills does not revive a former will there was only an inference that a will revoking by implication, would have had a different effect. In *Doughtery* v. *Holscheider*[20] there was a contingent will which revoked a former will by inconsistent provisions, only. The contingency failed but the former will which had not been re-executed was held invalid and the deceased was held to be intestate. In construing the Texas statute in *In re Brackenridge*,[21] the court said that where an instrument contains an express revocation of a former will it is not necessary that there be a disposition of the property—or if the dispositive part of the will fails the revocation is still good. This was not a case where the testator revoked the second will but rather where he left it to become operative as far as it could, and the fact that some parts of the will could not be effective did not prevent the revocatory clause from revoking the former one. No Texas case is found which holds that the destruction of the second will, revoking by implication only, revives the former one. In view of Texas decisions on this matter it is clearly wrong to say that the Texas courts definitely distinguished between the two kinds of wills.

A Michigan case, *Cheever* v. *North*[22] is considered a leading case for the doctrine set out in *James* v. *Marvin*. *Cheever* v. *North*, like the *Marvin* case, clearly distinguished between a second will containing an express revocatory clause and one without such clause. The court charged that if there was an express revocation in the later will the first was immediately revoked but if the subsequent will contained no clause revoking the former will, the subsequent destruction of the will by the testator would revive the former one. In that case there was no evidence whether the second will contained express revocation, and the court held that the burden of proving the existence of such a clause was upon the one alleging it, so that, in effect, the decision was based on a will containing no express revocation. Several Michigan cases prior to *Cheever* v. *North* held that the destruction of a second will which expressly revoked a former one did not revive the former,[23] and numerous cases since have held likewise, citing the *Cheever* case as authority,[24]

[18] See, 28 A.L.R. 917.

[19] 72 Tex. 481, 10 S.W. 558 (1889).

[20] 40 Tex. Civ. App. 31, 88 S.W. 1113 (1905).

[21] 114 Tex. 418, 245 S.W. 786 (1922).

[22] 106 Mich. 390, 64 N.W. 455, 37 L.R.A. 561 (1895).

[23] See, Scott v. Fink, 45 Mich. 241, 7 N.W. 799 (1881), Steven v. Hope, 52 Mich. 65, 17 N.W. 698 (1883) and cases cited therein.

[24] See, Danley v. Jefferson, 150 Mich. 590, 114 N.W. 470 (1908), Dingman v. Dingman, 199 Mich. 384, 165 N.W. 712 (1917) and others.

but no other case so clearly distinguishes between the two kinds of wills.

A Wisconsin case, *In re Noon's Will*[25] has been often referred to as upholding the view that express revocation is immediately effective. The court referred to the statute, in that case, providing for the revocation of wills by "another will or codicil, executed in writing", and said, "therefore, when a second will is drawn and executed with the formality required by statute, and containing an unlimited revocatory clause, all former wills are wiped out and held for naught". While the Wisconsin statute provided further that a will may be revoked, "*(or) by some other writing," etc.*, the court did not refer to that part of the statute. It might be said, therefore, that this decision is contrary to *Whitehill* v. *Habling* in that it is not based on the theory that a revocatory clause is effective as a "writing" apart from the will. But from the cases cited and the general language of the court, it is obvious that it intended to follow the doctrine as set out by the other cases without going into any detailed reasoning. Although it might be inferred from the language of the court that a will revoking by implication, only, would cause a different decision to be reached, the case does not hold that, and no such Wisconsin case has been found by the writer.

To summarize briefly: The question whether there is a distinction between a later will which revokes by express terms and one which revokes by implication, only, is inseperably connected with the proposition that express revocation is immediately effective. In many states this question is settled by statute. Although there are many dicta on the question only three states are generally conceded to distinguish between the two kinds of wills, and of these, only one has given (so far as the writer has found) an unequivocal decision in both respects.

PALMER L. HALL

DIVORCE—ALLOWANCE OF ALIMONY TO THE WIFE WHEN THE DIVORCE IS GRANTED BECAUSE OF THE WIFE'S FAULT

Alimony was first granted by the ecclesiastical courts of England as incidental to a divorce *a mensa et thoro*. It was considered as the allowance which a husband, by order of the court, paid to his wife living separate from him for her maintenance. This was true because the court could not decree an absolute divorce and the allowance was solely for the wife's support, to continue during their joint lives, or so long as they lived separate and apart.[1]

During the period in which the ecclesiastical court granted the divorce *a mensa et thoro*, the decree *a vinculo matrimonii* was granted only by act of Parliament when the marriage was for some cause unlawful *ab initio*.[2] It should be noted that the husband was entitled to take

[25] 115 Wis. 299, 91 N.W. 670 (1902).

[1] II Poll. & Maitland Hist. of Eng. Law (2d ed. 1911), p. 392 to 396; Madden, Domestic Relations (1931), p. 256 to 261 and 319 to 330.

[2] II Poll. & Mait., Hist. of Eng. Law (2d ed. 1911), p. 390; Madden,